82-1575

No. _____

THE SUPREME COURT OF THE UNITED STATES

Term: October, 1982

Paul Edward Ware,
Petitioner-appellant

vs.

John T. King, Secretary, Department
of Correction, and State of Louisiana,
Respondents-appellees

* * * * * * * * * * *

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

* * * * * * * * * * *

PETITION FOR WRIT OF CERTIORARI

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TO THE JUSTICES OF THE UNITED STATES SUPREME COURT:

The petition of Paul Edward Ware for a Writ of Certiorari respectfully represents:

1.

The questions presented for review are:

(1) Whether a defense attorney is constitutionally effective counsel when at the same time he is representing a defendant in a criminal case, said attorney is also subject to prosecution by the same authorities as are prosecuting his client for the unlawful misapropriation of THIRTY FOUR HUNDRED AND SEVERTY FIVE NO/100 ($3,475.00) DOLLARS; and

(2) Whether a defense attorney is constitutionally effective counsel when at the same time he is representing a defendant in a criminal case, the same authorities who are prosecuting his client are also seeking to deprive said attorney of his pension, which problem ended for the defense counsel shortly after his client's conviction.

2.

All parties to this proceeding are:

Paul Edward Ware, petitioner-appellant; John T. King director of the Department of Corrections and the State of Louisiana respondants-appellees.

3.

The decision of the Fifth Circuit Court of Appeals is reported as Paul Edward Ware, petitioner-appellant versus John T. King, Secretary, Department of Corrections, and State of Louisiana, respondant-appellees, 694 F 2nd 89 (Fifth Circuit,1982).

4.

The power of this Honorable Court to grant a Writ of Habeas Corpus provided by 28 USC § 2241.

(i) The judgment sought to be reviewed by petitioner herein was rendered December 20,1982.

(ii) No rehearing was applied for.

(iii) The jurisdiction of this court to review the judgment of the Fifth Circuit Court of Appeals is provided by 28 USC § 2244.

The constitutional provisions relied on by plaintiff-appellant herein are:

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enfoce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdicition the equal protection of the laws.

6.

Statement of the case:

Petitioner filed an application for Writ of Habeaus Corpus with the Federal District Court for the Western District of Louisiana as provided by 28 USC § 2254., having exhausted state remedies.

Petitioner-appellant was convicted on June 11, 1975 of armed robbery for which he had been arrested December 1,1974 after he had been shot by Deputy Sheriffs. During all relavent times, petitioner-appellant was unaware of the serious legal problems his own defense attorney was involved in, which problems the same officials as prosecuted plaintiff-appellant were either directly or indirectly connected with. Mr. Robert F. DeJean, Sr., the defense attorney had previously misapropriated THIRTY FOUR HUNDRED SEVENTY FIVE NO/100 ($3,475.00) DOLLARS of City Court funds and refused to return

same. Mr. DeJean was sued for the return of these funds with which the District Attorneys office had a indirect connection as nine (9) weeks before plaintiff-appellant's trial and the month before Mr. DeJean sought to withdraw form the representation of plaintiff-appellant's herein, a letter was introduced into the record of that suit [Boagni vs. DeJean, 342, So. 2nd 270] (3rd Circuit 1977) indicating the District Attorneys connection to the case. Also, Mr. DeJean was plaintiff in a suit entitled DeJean vs. City of Opelousas,et al (No. 68,125 27th Judicial District Court, St. Landary Parish, Louisiana) in which the District Attorneys office which was prosecuting plaintiff-appellant herein was also attempting to deprive Mr. DeJean of his pension benefits. A few days before petitioner's trial, the District Attorneys office was ordered to appeal a decision favorable to Mr. DeJean and after plaintiff's conviction, said decision was reveresd and Mr. DeJean got his pension without any problems.

Petitioner-appellant shows that his attorney had his own conflicts of interest with the District Attorneys office which was prosecuting petitioner-appellant, to such extent as rendered him ineffective of counsel under the 6th and 14th amendments

of the Constitution, in that said Defense Attorney was in a postition to trade away the rights of petitioner-appellant for his own benefit. While the Fifth Circuit held that plaintiff-appellant's arguments "are not supported by the facts and are purely specutive", plaintiff-appellant submits that this finding is erroneous.

SUMMARY OF ARGUMENT

A defense attorney is constitutionally ineffective when he may be subjected to a criminal prosecution, for unlawfully converting money at the same time he is representing a defendant, by the same officials procescuting his client. This is in addtition to the threat of disbarrment by a felony conviction or the Louisiana State Bar Association vs. Funderburk (supra) decision.

The District Court concluded [R-324] "Since no criminal charges were ever filed against Mr. DeJean, there is no reason to believe that Mr. DeJean would trade away the rights of his client in order to obtain favorable treatment from the Distrist Attorney's Office".

To this conclusion, petitioner has two arguments, viz (1) having recognized a conflict of interest which would have made it possible for DeJean to "trade away the rights of his clients" for his own benefit, the District Court erred in not granting petitioner's Writ of Habeas Corpus; and (2) Since the adverse civil judgment against DeJean was rendered between the day of petitioner's conviction and the day of sentencing, based on the same reasoning of the District Court we would argue that the fact that no criminal charges were filed against

DeJean is the proof that the "deal" recognized by the District Court was consumated by DeJean and the prosecutors.

(2) A defense attorney is constitutionally ineffective when his pension is in jeopardy and the person in a position to deprive him of all or part of that person is, at the same time,prosecuting the defense attorney's client.

The District Court did not consider this conflict of interest in its reasons. We argue that since DeJean was in a position to trade away the rights of his client, and prosecutor Brinkman was in a position to intercede with his client, the Police Jury, to drop the appeal of the award of DeJean's pension, which Brinkman's client voted to appeal the week before petitioner's conviction, the mere possibility of the defense attorney being in a position to make such a "deal" for his pension is enough to render his representation ineffective contary to the Sixth and Fourteenth Amendments.

(3) Petitioner-appellant shows taht he established the real conflict of interest between his defense attorney and the prosecutor, as it is reasonable to assume that attorneys will not admit to

prejudicial influnces under which they are working, making such charges of prejudice difficult to prove. Plaintiff-appellant shows that the holdings of the District Court and the 5th Circuit Court of Appeal are in error and petitioner's entitled to Writ of Habeas Corpus.

By Attorney:

STEVE LEBLANC

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Parish of East Baton Rouge

State of Louisiana

Affidavit

BEFORE ME, D. Bert Garraway, a Notary Public in and for the Parish of East Baton Rouge, State of Louisiana,

PERSONALLY CAME AND APPEARED:

Steve LeBlanc, who, being duly sworn did depose and state that three (3) copies of the above and foregoing Petition for a Writ of Certiorari has been served on defendants-appellees by planing said copies properly addressed to their counsel of record, Mr. Robert Brinkman, Attorney at Law, P.O. Box 868, Opelousas, Louisiana 70570, first class postage prepaid with the United States Postal Serivce this _____day of February, 1983.

_____

Steve LeBlanc

Sworn to and subscribed before me this _____ day of February, 1983.

_____

D. Bert Garraway

Paul Edward WARE
Petitioner-Appellant,

v.

John T. KING, Secretary, Department of Corrections, and State of Louisiana,
Respondents-Appellees

No. 82-3305
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Dec 20,1982.

Appeal from the Unites States District Court for the Western District of Louisiana.

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

694 F. 2nd 89

PER CURIAM:

Petitioner, Paul Edward Ware, appeals the district court's dismissal of his habeas corpus petition. In his habeas corpus petition, Ware, raised several grounds for relief, including an allegation that his trial counsel operated under a conflict of interest. The district court referred Ware's petition to a magistrate, who, after conducting an evidentiary hearing, concluded that Ware's arguments in support of a conflict of interest were not supported by the facts and were purely speculative. The district court accepted the magistrate's findings and recommendations and ordered the habeas corpus petition dismissed. This Court affirms.

On December 1,1974, a series of armed robberies took place in Opelousas, Louisiana, in which the following three convenience stores were robbed: (1) the Food Town Store; (2) The Medlock Store; and (3) the Lalonde Store. The robberies at the Foodtown Store and the Medlock Store took place prior to the robbery at the Lalonde Store. Police reports indicated that the robber was a black male wearing a blue windbreaker. Having received this report, two officers of the St. Landry Parish Sheriff Department proceeded to the Lalonde Store, and, upon entering the store, confronted Ware, who fit the description of the robber. Ware had a weapon, a gunfight ensued, and several people

were wounded, including one of the officers and petitioner Ware.

Ware was indicted by a St. Landry Parish Grand Jury on two counts of armed robbery and four counts of attempted first degree murder. Additionally, he was charged in a bill of information with one count of armed robbery. On June 12,1975, Ware was convicted for the armed robbery of the Lalonde Store. On January 24,1977, Ware was tried for the armed robbery of the Medlock Store and found not guilty. Ware was never tried for the Foodtown Store robbery. Untimately, Ware was sentenced to thirty-eight years at hard labor without the benefit of probation, parole or suspension of sentence. Ware's conviction and sentence were affirmed on direct appeal to the Louisiana Supreme Court and two state habeas corpus petitions were denied.

In February 1980, Ware initiated the instant habeas corpus petition in federal district court. Ware maintained that his sixth amendment and fourteenth amendment rights had been violated. Initially, Ware contended that his attorney, Robert F. DeJean, operated under a conflict of interest since the prosecutor, Robert Brinkman, was handling two nonrelated cases involving DeJean. Additionally, Ware argued that he was deprived of effective representation by his counsel's failure to conduct an adequate pretrial

investigation, effectively examine witnesses, present a good faith defense, and preserve post-conviction rights. Finally, Ware averred that the prosecutor used perjured testimony and evidence that had been tampered with in securing Ware's arrest and conviction. The district court referred Ware's habeas corpus petition to a magistrate, an evidentiary hearing was held, and, thereafter, the magistrate recommended that habeas corpus relief be denied. The district court accepted the magistrate's findings and recommendation and dismissed Ware's habeas corpus petition. Ware appeals to this court solely on the conflict of interest issue.

At the outset, this Court must determine the proper scope of factual review in this case. As noted previously, Ware's habeas corpus petiton was referred to a magistrate, and, thereafter, the district court accepted the magistrate's proposed findings and recommendations. In Nettles v. Wainwright, 677 F 2nd 404 (5th Cir. 1982) (enbanc), this Court held that"... failure to file written objections to proposed findings and recommendations in a magistrate's report...shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the district court execept upon grounds of plain error or manifest injustice". Id. at 408. However, the Court emphasized that this bar of appellate review occurs only if"...the magistrate

informs the parties that objections must be filed within ten days of filing of the magistrate's report."Id.

In the instant proceeding, no objections to the magistrate's findings were made. However, the record does not demonstrate that the magistrate adequately informed Ware of the serious consequences attendent to a party's failure to object to the magistrate's proposed finding. The magistrate included the follo ing statement at the conclusion of his report:

> Upon filing this report and recommendation with the Clerk of Court, the Clerk is directed to furnish a certified copy to petitioner and respondent, each of whom, under the provisions of 28 U.S.C. § 636, has ten (10) day from receipt in which to file any objections with the Clerk of this Court for consideration before final decision.

Although this statement did inform Ware of the need to file objections within ten days, it did not advise him of the consequenses that would result if he failed to comply. See Delony v. Estelle, slip op. at 4070, F. 2nd (5th Cir. July 30,1982). Consequently, Ware is not barred from attacking the magistrate's proposed findings of fact that were accepted subsequently by the district court.

Ware contends that the district court erred by rejecting his allegations that his trial counsel operated under a conflict of interest. In support of his conflict of

interest argument, Ware points to two nonrelated disputes in which the prosecutor and his defense counsel were involved.[1] The first situation giving rise to an alleged conflict of interest arises out of the following facts. Ware's counsel, Robert F. DeJean, was a City Court Judge for the City of Opelousas until he was defeated in a bid for re-election by the present City Court Judge, Kenneth Boagni. On March 30,1973, before leaving office, DeJean withdrew $3475 of city court funds for his personal use. On December 21,1973, Judge Boagni sued DeJean for the return of the funds. See Boagni v. DeJean, 342 So. 2nd 270 (La. App. 3rd Cir. 1977). Thereafter, approximatley two months prior to Ware's trial, a letter from the Attorney General's office dated July 16,1973 was introduced into the record in the civil suit against DeJean. The letter implies that DeJean might be subject to criminal prosecution for appropriation of the city court funds. Based upon these facts, Ware contends that the prosecutor and DeJean have such conflicting interests as to render DeJean's representation of him, Ware, ineffective.

The second dispute allegedly giving rise to a conflict of interest also involves the prosecutor and DeJean. Prior to Ware's trial, DeJean had initiated a civil action against the City of Opelousas seeking recovery of his retirement benefits. A few days before Ware's trial, the prosecutor was ordered by the police jury to appeal the state district

court's award of retirement funds that DeJean had received in the civil suit against the city. Ware contends that this dispute also placed DeJean and the prosecutor in a conflicting position that rendered DeJean's representation ineffective.

The United States Supreme Court has held that a party may obtain habeas corpus relief by demonstrating that his counsel represented conflicting interests. Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed 2nd 333 (1980). Although no prejudice need be shown if an actual conflict of interest is found to exist, the habeas corpus petitioner must demonstrate that the conflict is actual rather than speculative. Cuyler, 444 U.S. at 348, 100 S. Ct 1718; Turnquest v. Wainwright, 651 F. 2nd 331, 333-34 (5th Cir. 1981); see also United States v. Martinez, 630 F. 2nd 361 (5th Cir. 1980). In the instant case, after conducting an evidentiary hearing, the magistrate concluded that "the petitioner's [Ware's] arguments in support of a conflict of interest are not supported by the facts and are purely speculative." The district court accepted the magistrate's finding that no facts supported Ware's allegations of a conflict of interest and this Court is unable to conclude that this finding is clearly erroneous. See 28 U.S.C. § 2254(b); Fed. R. Civ. Pro. 52(a); and Louis v. Blackburn, 630 F. 2nd 1105 (5th Cir. 1980). Finally this Court holds that the district court did not err in its application for the "qualitative, normative

standards dictated by the Sixth and Fourteenth Amendments." see Washington v. Watkins, 655 F. 2nd 1346, 1354 (5th Cir. 1981).

Having concluded that the district court properly dismissed Ware's petition, this court affirms the district court's judgment.

AFFIRMED.

1. The State contended at the district court level that Ware had failed to exhaust one of his factual theories allegedly supporting his conflict of interest issue. However, the State has not argued failure of exhaustion before this Court, and, consequently, this Court concludes that the State had abandoned its exhaustion argument. See Hopkins v. Jarvis, 648 F. 2nd 981 983 n. 2 (5th Cir. 1981).

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

PAUL EDWARD WARE

VERSUS

STATE OF LOUISIANA
AND C. PAUL PHELPS

CIVIL ACTION NO.
800273

SECTION D

JUDGMENT

This matter was referred to United States Magistrate, William L. Goode, for his report and recommendation. After an independant review of the record in this case, the court concludes that the report and recommendation of the magistrate is correct, and this court adopts the conclusionsof the magistrate.

IT IS ORDERED, ADJUDGED AND DECREED that this action be and it is dismissed without prejudice.

Lafayette, Louisiana, this 24th day of March, 1982.

S/ W. Eugene Williams
UNITED STATES DISTRICT JUDGE

REPORT AND RECOMMENDATION

This matter was referred to the undersigned Magistrate for the purpose of review, report and recommendation, pursant to a standing order filed with the U.S. Clerk of Court in Lafayette, Louisiana, on March 16,1981, and signed by the Honorable W. Eugene Davis, United States District Judge, Western District of Louisiana.

Petitioner, Paul Eward Ware, was indicted by a St. Landry Parish Grand Jury on two counts of armed robbery and four counts of attempted first degree murder. In addition he was charged in a bill of information with one count of armed robbery. The three armed robberies occurred on December 1,1974, at three convenience stores known as the Food Town Store, the Medlock Store and the Lalonde Store, all in the city of Opelousas. All three stores were robbed within a 20 minute period according to police radio log reports. The Food Town and Medlock stores were the first two to be robbed. It was reported to police that they were robbed by a black male wearing a blue windbreaker. Deputy DeJean and Mouton walked into the Lalonde store, saw that the petitioner was a black male wearing a blue windbreaker and concluded that he was the suspect who had just robbed the first two stores. The petitioner

was carring a weapon, a burst of gunfire ensued, and Mrs. Lalonde, the petitioner, and Deputy Mounton was wounded. Petitioner was tried on June 12, 1975 for the armed robbery of the Lalonde store. He was found guilty by a unanimous jury. On January 24,1977, petitioner was tried for armed robbery of the Medlock Store and found not guilty. The petitioner was never tried for the Food Town Store robbery. On September 2,1975, the petitioner was sentenced to thirty-eight (38) years at hard labor without benefit of probation parole, or suspension of sentence.

28 U.S.C. 2254 (b) states that anapplication for a writ of habeas corpus on behalf of a person in custody, pursant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of that state. The issue raised in the petition presently under consideration are substantially the same as the issues set forth by petitioner in his application for habeas corpus to the Louisiana Supreme Court filed September 24,1979. Writs were denied on January 28,1980, Ware vs. Phelps, 379 So, 2nd 1113. Although several of the issues have never been presented to the state of district court, the exhaustion doctrine requires only that the federal claim be fairly presented to the highest court of the state

either by appeal or habeas corpus. Escobedo vs. Estelle, 650 F. 2nd, 70 72 (5th Cir. 1981).

ISSUES

The issues presented in this petition for writ of habeas corpus are:

(1) The conflict of interest between Robert F. DeJean, Sr., trial counsel for petitioner, the District Attorney and DeJean's obligations to petitioner.

(2) The competency, adequacy and effectiveness of petitioner's attorney with regard to:

(i) Pretrial investigation

(ii) Pretrial motions and discovery

(iii) Representation of petitioner's post conviction remedies and perfection of his appeal.

(3) The breach of the prosecution's duty to Paul Edward Ware in the utilization by the prosecution of perjured testimony, and evidence which was false, fabricated and/or had been tampered with, i.e.:

(i) The perjured testimony of Francis Lalonde,

(a) That she quit her employment;

(b) That she got a phone call from Mary Medlock; and,

(c) That she put the bills in the bag held by the man who robbed her, Paul Ware, when in truth and in fact, the inventory of the money in the bag on the floor showed that there were no bills therein.

(ii) The false and perjured testimony of Deputy Mounton.

(a) That petitioner's gun was empty and was "clicking" since both the evidence envelope and the tag attached to petitioner's gun showed only five spent shells and two loose shells, the gun wasn't empty;

(b) That they went to the "Medlock Store"; and,

(c) The discrepancy between his throwing down his .30 calibar carbine without having to fire the gun while trying to knock petitioner off his feet and the .30 caliber bullet found on the floor of the "Lalonde Store".

(iii) The suppression of relevant, material and exculpatory evidence by the prosecution, as well as the use of fabricated evidence;

(a) The known suppression of The "Medlock Report" which proves the petitioner was in the "The Lalonde Store" when the "Medlock Store" was being robbed;

(b) The fact that five spent .25 caliber bullets and two loose . 25 caliber were taken from the scene but only five spent bullets were sent to the crime lab, i.e. all the deputies who testified that the gun was empty were not telling the truth.

(c) The picture introduced into petitioner's trial showing the money in the bag on the floor of the "Lalonde Store" was posed at the report of Sgt. Alphonse Frilot shows that there was a lot of money on the hood of the car outside at about 7:48 a.m. in addition to all the

money in petitioner's jacket and jeans.

(d) The fact that police officers had to plant a money bag from the "Medlock Store" on the floor of petitioner's truck parked outside the "Lalonde Store" since petitoner was in the "Lalonde Store" when the "Medlock Store" robbery occurred.

It appears that the entire record of the State Court proceedings have been submitted to this Court for review, including copies of the original indicment and information, state's evidence including photographs, the transcript of the trial, copies of appellate briefs, habeas corpus writs of the trial court and Supreme Court of Louisiana. The material facts regarding issues two (2) and three (3) are adequately developed in the state court record. These issues can be resolved based on the documentation filed by the petitioner and respondant. The first issue raised the prospect of a conflict of interest between the petitioner's trial attoreny, Mr. Robert F. DeJean, Sr., and the prosecutor, Mr. Robert Brinkman. This issue was never brought before the trial court. Though the Louisiana Supreme Court reviewed the issue, the material facts were not adequately developed as there was never an evidentiary hearing in State Court on the allegation. For this reason, I ordered that an evidentiary hearing take place for the purpose of taking

testimony on the conflict of interest issue. The hearing was conducted on July 28th and 29th, 1981. The petitioner was allowed to expand the record on all the grounds raised in his application. Upon completion of the hearing, the petitioner and respondent were given the opportunity to submit a final memorandum on the issues. Because of difficulty in obtaining a transcript of the evidentiary hearing, the petitioner did not file a memorandum until December 10,1981. The state has elected not to file final memorandum.

GROUNDS FOR RELIEF

ISSUE NO. 1- Conflict of Interest

The allegations that there was a conflict of interest between Robert F. DeJean, Sr., and Robert Brinkman translates into the Sixth Amendment issue, the constitutional guarantee of effective assistance counsel. The substance of Petitioner's argument is that the prosecutor and defense counsel conspired to convict the petitioner. Petitioner relates a tangled web of chicanery which begins with the defeat of Mr. Robert F. DeJean, Sr., in his bid for reelection as City Court Judge. He lost the election for City Court Judge to Kenneth Boagni. The defeated DeJean on March 30,1973, before leaving office withdrew $3475.00 of City Court funds for his personal use. On December 21,1973, Judge Boagni sued DeJean for the return of the funds, Boagni v. DeJean, 342 So. 2nd 270 (3rd Cir. 1977). On April 2,1975, approximately two months prior to Paul Ware's trial, a letter from the Attorney General's

Office (Exhibit A-1) dated July 16,1973, in response to Judge Boagni's request was introduced into the record to the civil suit against DeJean. The letter implies that Mr. DeJean might be subject to criminal prosecution depending on the discrection of the District Attorney. No criminal charges were ever filed against DeJean. At the evidentiary hearing, Mr. DeJean testified that he withdrew the funds upon the advice of Judge Boagni.

> DeJean: "Judge Boagni came to my office, and he cited me an opinion of the Attorney General saying that he could retain fifty cents per ticket, if he signed the the report and sent it into the Department of Publice Safety.
>
> And, I employed a young lady to go in there and check to see how many of those tickets we had sent in; and, with the opinion of the Attorney General as interperted by Judge Boangi, that's what was accomp-ished." (Tr. pp. 39-40).

Mr. DeJean further testified that the suit filed against him by Judge Boagni for the return of the money was in fact a test case. Judge Boagni wanted a state court to determine the propriety of taking the money so that he would know whether or not it was lawful to withdraw money from the ticket receipts for himself.

The only relevance that these factual circumstances have to this habeas corpus petition is that the suit by Boagni in connection with the opinion from the Attorney General suggest that Mr. DeJean might have been subject

to a criminal charge. The same District Attorney's Office that was in charge in prosecuting Paul Ware would also have been responsible for prosecuting Mr. DeJean. Petitioner's unsubstantiated allegation is that the District Attorney's office made a deal with DeJean, i.e., if DeJean would agree to aid in the conviction of Paul Ware, the District Attorney's office would a agree not to prosecute DeJean for the misappropriation of the $3,475.00. The petitioner submits that this conflict of interest, whether it be potential or actual, denied him his Sixth Amendment right to effective assistance of counsel.

The framework for the Sixth Amendment conflicts of interest problem usually involves one or more counsel representing two or more co-defendants. Representation of one defendant often leads to the prejudice of the other defendant. The facts in this case involve a structurally different conflict. The conflict is not between two defendants and their attorney, but rather the conflict is alledged to exist between the prosecutor and defense counsel. Petitioner argued that Mr. DeJean had competing and conflicting interest from his own which resulted in a denial of his right to counsel and a fair trial.

" The Supreme Court has squarely held that a state prisoner may obtain a federal writ

> of habeas corpus by showing that his retained defense counsel represented potentially conflicting interests. Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed 2nd 333 (1980) The Court found the failure of retained counsel to provide adequate representation free of conflicting interest can render a trial so fundamentally unfair as to violate the Sixth Admendment, made applicable to the state through the Fourteenth Amendment. Id at 343-44,100 S. Ct. at 1715-16... Moreover, the conflict must be actual rather than speculative. Cuyler, 446, U.S. at 348, 100 S. Ct. at 1718. "Turnquest v. Wainwright, 651 F, 2nd 331, 333-34 (5th Cir. 1981).

It is my opinion that this standard of review should apply to the facts herein under consideration. In order for the petitioner to succeed, he has the burden of showing that the conflict actual and not speculative. Johnson v. Hopper, 639 F. 2nd, 236, 238 (5th Cir. 1981).

Not one shred of testimony taken at the evidentiary hearing suggests the possibility of a conflict of interest. The District Attorney, Morgan Goudeau, III, testified that he recalled discussing the matter with Mr. Brinkman and that they concluded that Judge DeJean had not committed a criminal act. (Tr. pp. 277). Since no criminal charges were ever filed against Mr. DeJean, there is no reason to believe that Mr. DeJean would trade away the rights of his client in order to obtain favorable treatment from the District Attorney's office. The petitioner suggested several additional possible conflict of interest situations between himself

and Mr. DeJean, however, they are so extenuated and implausible as not to merit review. It is my finding that the petitioner's arguments in support of conflict of interest are not supported by the facts and are purely speculative. I recommend that this ground for relief be dismissed as being without merit.

ISSUE NO.II: Effective Assistance of Counsel:

The Sixth Amendment right to counsel is a fundamental right, Argersinger v. Hamlin, 407 U.S. 25 (1972). Adequate counsel under the Sixth Amendment is counsel likely to render and rendering reasonably effective assistance. Mays v. Balkcom, 631 F. 2nd 48 (5th Cir. 1980) Errorless counsel is not required, Kemp v. Leggett, 635 F. 2nd 453 (5th Cir. 1981), and counsel may not be judged ineffective by hindsight. Lovett v. Florida, 627 F. 2nd 706 (5th Cir. 1980), claims of ineffective assistance of counsel require an inquiry into the actual performance of counsel. The determination of whether representation was reasonably effective must be based on the totality of the circumstances. Lovett, supra.

First, the petitioner submits that he was denied effective assistance of counsel because Mr. DeJean's pretrial investigation was inadequate. Inadequate preparation of counsel is one ground for finding a violation of the Sixth Amendment right to effective counsel. Kemp v. Leggett, 635 F. 2nd. 453 (5th Cir.1981).

Even when counsel's investigation and preparation are determined to have been seriously inadequate there must be a showing that the habeas petitioner was to some degree prejudiced. Washington v. Watkins, 655, F. 2nd 1346, 1356 (5th Cir. 1981) In response to questioning as to how he prepared the petitioner's case for trial, Mr. DeJean responded as follows:

> A. Well, I went to work on this case, interviewing witnesses and talking to them.
>
> Q. What witnesses did you interview?
>
> A. I interviewed the police officers, and I thought I was very fortunate. One day I was in National Food Store, and the lady that was allegedly involved in the alleged robbery of her store was in there.
>
> And, I happened to recognize her, because I had been in the store before. And, I asked her how she felt. And, she proceeded to talk to me about, at least, ten or fifteen minutes and giving me what her side of it was.
>
> Of course, I went back and made notes of what she told me. And, it was basically the same report, of course, that she would have given the officers.
>
> But, she told me that the whole thing, and we discount what somebody says in a period of excitement. And, naturally, representing Mr. Ware, I gave more credence to his side of it than her side of it. (Tr. pp. 60-61).

Mr. DeJean testified that he interviewed the two arresting officers and the state's chief witness, Mrs. Lalonde, prior to the trial. "Counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers".

Lovette v. Florida, 627 F. 2nd 706, 708 (5th Cir. 1980) it is my finding that Mr. DeJean conducted an adequate pretrial investigation. The petitioner had failed to show how he was prejudiced by Mr. DeJean's pretrial investigation as is required by Washington.

Secondly, the petitioner submits he was denied effective assistance of counsel because Mr. DeJean failed to file any pre-trial motions or conduct any discovery. Mr. DeJean testified at the evidentiary hearing as follows:

> "The whole record was made available to me, the whole record, as I recall. I had everything in interviewing the witnesses. They were told they could speak with me. And, I had the whole matter in my control and for my perusal and investigation.
>
> Because, that's one of Mr. Brinkman's tactics, when he thinks he has an open and shut case. Otherwise, he doesn't let you get that". (Tr. p. 62).

Since Mr. Brinkman gave Mr. DeJean the state's file, the best discovery was made available to the petitioner's attorney. This greatly reduced the need for pretrial defense motions.

Thirdly, the petitioner submits that he was denied effective assistance of counsel at his trial. He attacks Mr. DeJean's opening argument, cross examination and direct examination. The attack on Mr. DeJean's performance at the trial is completely argumentative. Petitioner fails to flag any crucial, critical or highly significant errors made by Mr. DeJean

during the course of the trial. Much of the argument made by petitioner concerns evidentiary matters which have little to do with trial counsels performance. For example, the petitioner faults DeJean for not calling witnesses that would have testified favorably about his character. He criticizes counsel for not calling witnesses to a card game he participated in earlier in the day prior to the robbery. Petitioner argues that he won that day and had no motive for robbing a store.

> "[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative. See United States v. Doran, 564 F. 2nd 1176, 1177-78 (5th Cir. 1977); Haggard v. Alabama, 550 F. 2nd at 1022." Buckelew v. United States, 575 F. 2nd 515 (5th Cir. 1978).

Petitioner's attack on the effectiveness of Mr. DeJean during the trial is totally without merit.

Petitioner's fourth and final argument in support of his claim of ineffective assistance of counsel is that Mr. DeJean failed to make objections at the trial for the purpose of preserving petitioner's post conviction remedies in order to perfect a meritorious appeal. The Sixth Amendment entitles the accused to an attorney reasonably likely to render and rendering reasonably effective assistance.

> "[T]he methodology for applying that standard involves an inquiry into the actual performance

> of counsel conducting the defense and a determination of whether reasonably effective assistance was rendered based upon the totality of circumstances in the entire record. See, e.g. Lovett v. Florida, 627 F. 2nd 706 (5th Cir 1980) United States v. Gray, 565 F. 2nd 881 (5th Cir. 1978); Lee v. Hopper, 499 F. 2nd 456 (5th Cir. 1974). It is within this framework of totality of circumstances that we judge the "fundamental fairness" of the trial and utimately counsel's effectiveness." Washington v. Estelle, 648 F. Fd [sic] 276 (5th Cir. 1981).

Based on the totality of the circumstances as adduced from the evidentiary hearing, the transcript of the trial and the record as a whole, it is my finding that the petitioner received a fundamentally fair trial. While it is correct that Mr. DeJean made few objections during the trial, the petitioner fails to point out any specific unobjected to errors that might have merit and that might constitute a denial of the right to a fundamentally fair trial. The thrust of the petitioner's argument was that Mr. DeJean failed to perfect a credible appeal. (Petitioner's brief pp. 19-20). Mr. DeJean filed an untimely appeal on the issue of the competency of the defendant to stand trial. He testified at the evidentiary hearing (pp. 150-151) that this was the only issue which he thought had any merit. Mr. DeJean should not be found to be ineffective simply because he failed to brief errors which he felt were without merit. Petitioner's fourth argument is without merit.

ISSUE NO. III. The breach of the prosecution's duty to Paul Edward Ware, the utilization by the prosecution of prejured testimony and evidence which was false, fabricated and/or had been tampered with as well as the suppression of relevant exculpatory evidence.

The third gound for relief first focuses on a breach of duty by the prosecution to the accused. Petitioner cites U.S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976).

> [I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.

Agurs, is cited for the proposition that the State withheld relevant exculpatory evidence and so breached its duty to the accused. Petitioner's burden of proof is very similar to a claim based on Brady v. Maryland, 373 U.S. 83 (1963). In order to state a successful Brady claim, the habeas corpus petitioner must show the the prosecution suppressed evidence, that the evidence was favorable to him, and that the evidence was material. Hughes v. Hopper, 629 F. 2nd 1036 (5th Cir. 1980) As in Brady, petitioner must first show that the evidence exists which is favorable to him. However, Agrus goes one step further, the evidence must be so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce. The petitioner failed to show the existence of this material

or that it was witheld by the prosecutor. Assuming that the petitoner could show the existance of such evidence, he could not show that the prosecutor breached a duty to produce. Mr. DeJean testified at the evidentiary hearing that Mr. Brinkman handed his entire file over to him. If there was any Agurs material, it was made available to petitoner's trial counsel.

The third ground for relief secondly focuses on the utilization by the prosecution of perjured testimony, evidence which was false, fabricated and/or had been tampered with. "In order for perjury by a witness to constitute grounds for the grant of a habeas corpus writ it would have to be shown that the state knowingly used the perjured testimony". Braxton v. Estelle, 641 F. 2nd 392, 395 (5th Cir, 1981) as in Braxton, the petitioner has completely failed to support his claim that there was a knowing use of perjured testimony by the state. "The Fifth Circuit's resistance to challenge to evidentiary matters by habeas is firmly established." Woods v. Estelle, 547 F. 2nd 296, 271 (5th Cir 1977) the introduction of false, fabricated and/or tampered with evidence must be of such a magnitude as to constitute a denial of "fundamental fairness." Meyer v. Estelle, 621 F. 2nd 769, 771 (5th Cir 1980) the admission of this evidence can justify habeas corpus relief only if the error was

"material in the sense of a crucial, critical, highly significant factor." Bryson v. State of Alabama, 634, F. 2nd 862 (5th Cir. 1981) it is my finding, after reviewing the transcript of the evidentiary hearing that the prosecutor, Mr. Brinkman did not intentially introduce prejured testimony or evidence which was false, fabricated or tampered with. Further, it is my finding that the specific instances pointed out by the petitioner either were not supported by the testimony taken at the evidentiary hearing or were not relevant to the charge for which he was convicted. None of the questionable evidence involved crucial, critical, highly significant factors in trial. For example, gound for relief (3) (i) (A) (B) (C) relate to the prejured testimony of Francis Lalonde. Assuming (A) (B) and (C) were perjured statements, none of them have any relation to petitioner's guilt or innocence. The alleged perjured testimony does not detract from the overwhelming evidence that the petitioner robbed the Lalonde Store. In addition, petitioner make referances to the Medlock Store in ground for relief (3) (ii) and (iii) (A) (D). These arguments are not related to the charge for which he was convicted. I reaffirm my earlier finding that the petitioner received a fundamentally fair trial and recommend that the third ground for relief be adjudged without merit.

It is further considered that there is no merit to any of the contentions presented by petitioner, and it is recommend that his application for writ of habeas corpus be DENIED, and that there be judgment entered for respondent. A proposed judgment is attached.

Upon filing this report and recommendation with the Clerk of Court, the Clerk is directed to furnish a certified copy to petitioner and respondent, each of whom, under the provisions of 28 U.S.C § 636, has ten (10) days from receipt in which to file any objections with the Clerk of Court for consideration before final decision.

THUS DONE AND SUBMITTED to the Clerk at Lafayette, Louisiana, this 9th day of February, 1982.

S/
WILLIAM L. GOODE
United States Magistrate